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No. 99-1947

IN THE

Supreme Court of the United States

ALEXANDRIA HISTORICAL RESTORATION AND PRESERVATION COMMISSION, *ET AL.*,

Petitioners,

v.

FEDERAL HIGHWAY ADMINISTRATION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

S. William Livingston*
Mitchell F. Dolin
Thomas L. Cubbage III
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Attorneys for Petitioners

* Counsel of Record

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RULE 29.6 STATEMENT

The petitioners are the Alexandria Historical Restoration and Preservation Commission, the Historic Alexandria Foundation, and the Coalition for a Sensible Bridge, Inc. The Coalition for a Sensible Bridge, Inc., is a not-for-profit corporation that has no parent corporation or publicly held securities.

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REPLY BRIEF FOR THE PETITIONERS

The petition should be granted. There is a real conflict among the circuits on a critical issue for the enforcement of a vital statute, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. Respondents' brief fails to acknowledge either the conflict or the fact that the

approach adopted by the decision below threatens to eviscerate NEPA's effectiveness.

1. The decision below holds that the evaluation of "all reasonable alternatives" in the environmental impact statement ("EIS") need not include alternatives that fail to provide a "complete solution" to the agency's self-defined objectives, and that those objectives can be defined without regard to environmental considerations. Pet. App. 9a, 12a-13a. It was only by adopting this extreme standard that the court of appeals could affirm the highway agency's refusal to consider a ten-lane replacement for the six-lane Wilson Bridge as a "reasonable alternative" to the agency's preferred choice of a twelve-lane bridge, even though the ten-lane alternative substantially met the agency's goals but with much less damage to the environment.

The Seventh Circuit, in contradiction to the D.C. Circuit's approach, does not permit an agency to exclude alternatives by the simple expedient of adopting a narrow non-environmental definition of a project's objective, requiring instead that the agency look at any "reasonable alternatives" that meet the agency's "general goals." *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 666, 669 (7th Cir. 1997); *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). In this case, a ten-lane bridge fully meets the general goal of replacing an aging six-lane "bottleneck" bridge on an eight-lane highway, with room to accommodate additional traffic growth in the future. Pet. 12. Thus, had the court below followed the approach of the Seventh Circuit, it would have ruled that respondents' EIS failed to comply with NEPA's requirement that "all reasonable alternatives" be evaluated. 40 C.F.R. § 1502.14; 42 U.S.C. § 4332(2)(C) (App. 54a-55a).

Respondents' efforts to distinguish the Seventh Circuit decisions are perfunctory. As to *Simmons*, the only purported distinction -- that the agency "amply justified its

decision to focus on future peak-hour traffic demand, rather than . . . the projected *daily* volume of traffic" (Opp. 11) -- misses the point.[1] Even if the agency had explained in detail why it wanted any alternative to satisfy 100 percent of the agency's traffic projections, and not 99.99 percent or anything less, this would not be a reason under *Simmons* for excluding alternatives that met the general goal (a new, larger bridge to replace an older smaller one) at less environmental cost but with a modest sacrifice in capacity. While it might be permissible for the agency to select a twelve-lane bridge from among a range of "all reasonable alternatives," it must nonetheless first evaluate those alternatives.

As for *Van Abbema*, respondents' only contention is that it is distinguishable because it involved a decision by a federal agency to approve an application by a private entity. Opp. 11-12. Respondents do not explain why this purported distinction should make any difference, or why NEPA would be applied any differently in that context than it would in any other context, including the one in this case. Nothing in the statute suggests any basis for this distinction, and there is certainly nothing in the rationale of the Seventh Circuit's decisions which would justify it. Indeed, the critical underpinning of the Seventh Circuit's decisions -- that "[i]f the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role," 120 F.3d at 666 -- applies equally to this case as it does to any other NEPA case.

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[1] It is also factually inaccurate. While the EIS contained data both on projected peak hour traffic and daily volumes, it did *not* define the objectives of the project solely in terms of peak-hour traffic projections, but did so in more general terms, which included protection of the environment. Pet. 12, citing C.A. App. pp. 107-16 (Final EIS). No alternative could meet all of the objectives perfectly because all involved tradeoffs, such as capacity versus environmental impacts.

Moreover, the D.C. Circuit has explicitly recognized its disagreement with *Van Abemma*, as it explained in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991).[2] *See also* Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants,* 60 GEO. WASH. L. REV. 1232, 1257, 1268 (1992) (discussing D.C. Circuit's disagreement with Seventh Circuit).

Respondents also cannot explain away the conflict between the decision below, which permits exclusion of all alternatives that fall short of a "complete solution" to the agency's definition of its objective, and the Eleventh Circuit's position that an alternative only "partially satisfying the need and purpose of the proposed project" may nonetheless be a reasonable alternative which must be evaluated in an EIS. *North Buckhead Civic Ass'n. v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990). Even if this were dicta, as respondents contend, this statement by the Eleventh Circuit highlights that it has gone in one direction and the D.C. Circuit in another, and that there is a need for this Court to intervene. Respondents also contend that the Eleventh Circuit's rejection in *North Buckhead* of "heavy rail" as a reasonable alternative to a highway project is analogous to the refusal of the agency here to consider a ten-lane bridge as an alternative to a twelve-lane bridge when replacing a six-lane bridge. The analogy is obviously a remote one at best. More importantly, it ignores the fact that the exclusion of the "heavy rail" option was upheld because there was no evidence that it would have a less severe environmental impact (*see* 903 F.2d at 1542), whereas here there is

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[2] Respondents suggest that the Seventh Circuit in *Simmons* has retreated from *Van Abbema*, *see* Opp. 12 n.5, but in truth *Simmons* quotes and follows the relevant language in *Van Abbema*. *See Simmons*, 120 F.3d at 669.

undisputed evidence that a ten-lane bridge would be better for the environment than a twelve-lane bridge.

2. The conflict among circuit decisions is not only real, but it also involves an issue of significant importance.

The preparation of an EIS for federal projects is the central feature of NEPA, the nation's fundamental environmental charter, and the requirement that there be a "[r]igorous" discussion of "all reasonable alternatives" is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14. "No decision is more important than delimiting what these 'reasonable alternatives' are." *Simmons*, 120 F.3d at 666.

The approach of the Seventh and Eleventh Circuits requires agencies to look at a range of alternatives but, unlike the D.C. Circuit's, does not exclude an alternative that meets a project's general goals with many fewer adverse environmental impacts just because it may fall a little short of the agency's self-selected non-environmental objectives. As Judge Richard Arnold recently explained, it is "exactly the point of NEPA" to force federal agencies to evaluate alternatives that might not meet all of the agency's transportation (or other functional) objectives but which carry fewer environmental costs. *City of Bridgeton v. FAA*, 212 F.3d 448, 465 (8th Cir. 2000) (dissenting opinion). Otherwise, an agency could manipulate the EIS process by adopting such a narrow definition of its objectives that there are no meaningful alternatives left to evaluate. "One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons*, 120 F.3d at 666. That is what happened here -- the agency evaluated only 12-lane options, nothing smaller and nothing larger. Even respondents concede that the agency could not lawfully define "its

objective as the construction of a 12-lane bridge," because this would be an improper "artificial narrowing of agency objectives" (Opp. 11 n.4), but the court of appeals allowed the agency to do just this through the back-door by adopting a narrowly-defined objective that could only be met by a twelve-lane bridge.

If the decision below goes unreviewed, agencies will be encouraged to state their highway project objectives strictly in terms of the ability to accommodate projections of peak-hour traffic twenty years in the future. This will then allow the agency to refuse to consider anything with fewer lanes, and the EIS at that point will be unable to play any meaningful role because, as in this case, all of the alternatives will be the same size and there will be no consideration of smaller, less environmentally insulting alternatives. Respondents quote the decision below that it is "simply a *non sequitur* to call a proposal that does not 'offer a complete solution to the problem' a 'reasonable alternative,'" but neither they nor the court explain why this is so. Opp. 9-10, quoting Pet. 13a. In truth, it would be entirely reasonable for political leaders or agency heads -- who, along with the public, are intended beneficiaries of the alternatives analysis -- to conclude that a smaller project, at less monetary cost and with less harm to parks and other environmental resources, is preferable to a larger project urged by those whose only objective is smooth traffic flow.

3. Respondents repeatedly refer to the court's statement that a ten-lane bridge would have less than half of the peak-hour traffic capacity of a twelve-lane bridge. Opp. 3, 6, 9 citing Pet. 11a. The statement, however, is completely unfounded. It should be obvious that adding two lanes to a ten-lane highway will not double its capacity. This common sense proposition is confirmed by the agency's own studies, which showed that a ten-lane bridge with HOV lanes would not only accommodate far more vehicles and people than currently use the bridge, but would carry nearly as many

vehicles and people per hour as would the agency's twelve-lane bridge. C.A. App. pp. 348, 1232, 1489. The statement in the court's opinion is based on a comparison of a twelve-lane bridge with HOV lanes with a ten-lane bridge with no HOV lanes. C.A. App. p. 1489. A ten-lane bridge can also have HOV lanes, and FHWA's studies showed that a ten-lane bridge with HOV lanes has 90 percent or more of the person-carrying capacity of a twelve-lane bridge with HOV. C.A. App. pp. 348, 1232, 1489.

Respondents are likewise wrong in implying that even the twelve-lane bridge could handle the projected traffic levels in 2020 without congestion. In fact, only an eighteen-lane bridge could achieve that end -- both the ten-lane and twelve-lane bridges would experience congestion, with the difference being one of degree. C.A. App. 166. The suggestion that the twelve-lane option represents a "complete solution" to the traffic problem is unsupported.

4. Amicus Commonwealth of Virginia argues that the petition must be denied because Congress has mandated that the new Wilson Bridge have twelve lanes. Amicus Br. 3-4. Notably, neither the court below nor respondents have adopted this argument, undoubtedly because they recognize that it is utterly without merit. The statute on which Virginia relies says that the bridge shall have "not more than 12 traffic lanes," *not* that it must have twelve lanes. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1116, 112 Stat. 158. This language certainly permits a ten-lane bridge. Moreover, it is clear that a Senate committee chairman believed that it continued to be "fundamental[l]y important" that FHWA's actions with respect to the Wilson Bridge be governed by NEPA. *See* letter from Sen. Chafee to DOT dated May 10, 1999, included in the addendum to petitioners' brief to the D.C. Circuit.

The remaining arguments in the amicus brief either echo those made by respondents, and are dealt with above, or make irrelevant assertions, largely unsupported by citations to the record, as to why the state favors a twelve-lane bridge.[3] The important issue addressed by this petition is not whether a bridge of a particular size should be built, but whether the environmental analysis can be based on an unreasonably narrow range of alternatives.

CONCLUSION

For the foregoing reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

S. William Livingston*
Mitchell F. Dolin
Thomas L. Cubbage III
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Attorneys for Petitioners

* Counsel of Record

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[3] The state's assertions are also at odds with undisputed evidence showing that a ten-lane bridge would have fewer adverse environmental impacts than a twelve-lane bridge, while providing substantially similar transportation benefits. *See* pp. 20-25 of petitioners' brief to the D.C. Circuit.